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No. 559

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. —

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v.

PITTSBURGH PLATE GLASS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on September 2, 1959.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 16–31) is reported at 270 F. 2d 167. The findings of fact, conclusions of law, and order of the Board (R. 1–17) [1] are reported at 121 NLRB 758.

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, pp. 31–32) was entered on September 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the Board's appendix filed in the court of appeals.

QUESTION PRESENTED

Section 9(b) of the National Labor Relations Act provides that the National Labor Relations Board shall determine "in each case whether" the appropriate unit for collective bargaining purposes "shall be the employer unit, craft unit, plant unit, or subdivision thereof." In 1954, the Board announced that it would thereafter select a craft group as an appropriate unit whenever (1) the employees for whom separate representation is sought constitute a true craft group, and (2) the union seeking to represent them traditionally represents employees of that type on a craft basis, without regard to whether the industry previously had conducted collective bargaining on an industry-wide or a plant-wide basis, or whether the plant had an integrated operation.

The question presented is whether the provision in Section 9(b) that the Board must determine the appropriate unit "in each case" precludes it from certifying a craft unit whenever the foregoing two conditions are met, and instead requires it, as the court below held, to "decide *in each case* what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace."

STATUTE INVOLVED

Section 9(b) of the National Labor Relations Act, as amended (61 Stat. 143, 29 U.S.C. 159(b)), provides as follows:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes

of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On October 11, 1956, International Brotherhood of Electrical Workers ("Electrical Workers"), filed a representation petition with the Board, pursuant to Section 9(c) of the Act, in which it requested certification as bargaining representative of the electricians, instrument men, apprentices and helpers at respondent's Cumberland, Maryland, plant. At the time the petition was filed, respondent's Cumberland plant employees were not represented by any union. Subsequently, on November 8, 1956, respondent and United Glass and Ceramic Workers of North America, AFL–CIO ("Glass Workers") executed an agreement that provided, in substance, that an existing collective bargaining contract between respondent and Glass Workers covering respondent's other glass plants would be applicable to the production and maintenance employees at the Cumberland plant (R. 22–23; 38–42, 56–58).

At the hearing on the Electrical Workers' petition, respondent and Glass Workers, which intervened in the representation proceeding, urged that the petition

should be dismissed because the integrated nature of the company's operations rendered inappropriate any unit other than one embracing all production and maintenance employees. On May 23, 1957, the Board issued its decision rejecting this contention.

The Board applied the principle of *American Potash & Chemical Corp.*, 107 NLRB 1418, 1422—that a craft group is an appropriate unit "where a true craft group is sought and where, in addition, the union seeking to represent it is one which traditionally represents that craft." Finding, on the basis of the record as a whole, that the electricians' unit sought by the Electrical Workers consisted of a distinct and homogenous group of skilled journeymen craftsmen, and that the Electrical Workers traditionally represented employees of that type, the Board concluded that such a unit was an appropriate one for collective bargaining purposes. It accordingly directed an election among the following employees—"All electricians, including shift, shop, and electronics electricians, instrument repairmen, and apprentices for such classifications, employed at the Employer's plate glass manufacturing plant in Cumberland, Maryland"—to determine whether they wished to be represented by the Electrical Workers, by the Glass Workers, or by neither (R. 24–27).

At the election, conducted on June 19, 1957, Electrical Workers received 12 of the 21 votes cast, and Glass Workers received 9 votes. No objections having been filed by the parties to the conduct of the election, the Board, on June 27, 1957, certified Elec-

trical Workers as the bargaining representative of the employees in the craft unit (R. 7; 28–29, 36–37).

On July 5, 1957, Electrical Workers wrote to respondent, reciting its certification, and requesting that no changes be made in any of the conditions of employment of the employees in the unit except by agreement with Electrical Workers, pending execution of a contract. Respondent replied that it "does not recognize the International Brotherhood of Electrical Workers as the collective bargaining representative for any of its employees" (R. 7–9; 17–18, 29–35). Electrical Workers then filed a charge with the Board that respondent had violated the Act by refusing to bargain with it.

B. THE BOARD'S CONCLUSIONS AND ORDER

After hearing, the Board, on the basis of the foregoing facts, concluded that respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the union certified by the Board as the representative of an appropriate unit of its employees. Accordingly, the Board directed respondent (1) to cease and desist from its unfair labor practice, (2) to bargain with the Electrical Workers upon request and (3) to post appropriate notices (R. 15–17).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals refused to enforce the Board's order on the ground that "the action of the Board in formulating the policies [enunciated in *American Potash*] and in applying them in the pending case was arbitrary and discriminatory" (p. 28, *infra*). The court held that Section 9(b) of the Act precludes the

adoption of "the flat rule" of *American Potash* "that craft units must be split off from an established industrial unit whenever requested by a union that traditionally represents employees in the craft and that this rule is to be applied irrespective of the nature or the degree of integration in the industry and irrespective of the established practice of collective bargaining prevailing in the industry" (pp. 23–24, *infra*). The court stated that the "amended section expressly requires the Board to decide *in each case* what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace" (p. 26, *infra*, emphasis in original). The court also noted that in *American Potash* the Board had reversed its prior decision in *National Tube Co.*, 76 NLRB 1199, in which it had held that bargaining history and integration of operations were relevant factors in determining the appropriateness of craft unions; and that after *American Potash* it had continued to apply the *National Tube* principles to the four integrated industries to which they had already been applied (pp. 29–31, *infra*); and it concluded (p. 29, *infra*) that it was "discriminatory" for the Board to refuse to apply those principles to the plate glass industry, which is also highly integrated and has an equally long history of industry-wide bargaining.

REASONS FOR GRANTING THE WRIT

1. The validity of the Board's *American Potash* principles is an issue of major importance in the administration of the Act. For nearly six years, the Board has applied these principles in determining the propriety of craft units in all industries subject to its jurisdiction (with the exception of the four where the

earlier *National Tube* doctrine (pp. 8–9, *infra*) is still applied). The decision below invalidates these principles, necessarily creates serious doubt as to the legality of the numerous bargaining units created thereunder, and is likely to have an unstabilizing effect on existing collective bargaining relations.

The problem of the principles governing the establishment of craft units has been a difficult and recurring one since the Board was created in 1935.[2] Early in the administration of the Wagner Act, the Board concluded that a history of bargaining on a plant-wide basis would automatically preclude the establishment of a craft unit (*American Can Co.*, 13 NLRB 1252). At the same time, the Board promulgated the "Globe doctrine," which permitted craft employees to determine for themselves whether they desired separate representation in a craft unit or inclusion in a plant unit, in the situation where either unit would be appropriate and there were unions seeking to represent them in either unit (*Globe Machine and Stamping Co.*, 3 NLRB 294). However, in 1947, Congress, being dissatisfied with the *American Can* principle, enacted Section 9(b)(2), which provides that the Board shall not "decide that any craft unit is inappropriate for [collective bargaining] purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in

[2] See, for example, Fourth Annual Report of the National Labor Relations Board (G.P.O. 1940), pp. 83–89; Eleventh Annual Report of the National Labor Relations Board (G.P.O. 1947), pp. 23–26; Sixteenth Annual Report of the National Labor Relations Board (G.P.O. 1952), pp. 88–91.

the proposed craft unit vote against separate representation."

In *National Tube Company*, 76 NLRB 1199 (1948), the Board concluded that this provision was merely intended to preclude it from selecting a craft unit on the ground that a larger unit had previously been established, but that it did not otherwise restrict the Board's discretion to determine whether a craft unit would be appropriate. Accordingly, in that case, involving a plant in the basic steel industry, the Board declined to sever a group of craftsmen from a production and maintenance unit, in view of the integrated nature of the plant's operation and the industry's history of bargaining on a plant-wide basis. The same principle was then applied to plants in three other industries.[3]

However, in 1954, in *American Potash & Chemical Corp.*, 107 NLRB 1418, the Board reexamined its criteria for the establishment of craft units and concluded that the policies of the Act and the purposes of Section 9(b)(2) would be better effectuated by not giving weight to the factors of integration and industry-wide bargaining history. Hence the Board announced that the *National Tube* doctrine would not be further extended, and that, in the future, craft units would be found appropriate, irrespective of these fac-

[3] *Corn Products Refining Co.*, 80 NLRB 562 (wet milling); *Weyerhaeuser Timber Co.*, 87 NLRB 1076 (lumber); *Permanente Metals Corp.*, 89 NLRB 804 (basic aluminum). At the same time, the Board, absent the factor of integration of operations, continued to direct self-determination, or "Globe," elections when a timely petition for a group of employees exercising craft skills was filed. See *Thirteenth Annual Report of the National Labor Relations Board* (G.P.O. 1948), p. 37.

tors, where separate representation was sought with respect to a true craft group and the union seeking to represent it was one which traditionally represents employees of that type. However, in order to avoid upsetting a pattern of bargaining already firmly established, the Board stated that it would "continue to decline to entertain petitions for craft or departmental severance in [the four] industries to which the Board has already applied *National Tube* and where plantwide bargaining prevails" (107 NLRB at 1422).

The effect of the decision below is to overturn the principles governing the designation of craft units that the Board has developed over the years as most likely to effectuate the policies of the Act; and in substance to require the Board to give weight to the criteria used in the *National Tube* case, which it rejected almost six years ago because they had the undesirable "effect of permanently foreclosing the possibility of establishing craft or departmental units in an entire industry by freezing that industry into an industrial unit for bargaining purposes" (*American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, 1420).[1] The correctness of a ruling that has such significant consequences plainly calls for review by this Court.

2. In holding that the Board's designation of craft units on the basis of the *American Potash* criteria violates the requirement in Section 9(b) of the Act that the Board determine the appropriate unit "in each case," the court below has failed to give proper effect to the settled rule that an agency may, on the basis of

[1] However, the court casts doubt on whether even the *National Tube* criteria could be applied pursuant to general rule. (See *infra*, pp. 30–31.)

its experience, formulate the general principles that it will follow in applying statutory criteria to particular cases. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348–349; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; Davis, *Administrative Law Treatise* (West, 1958), Vol. 2, p. 353. As long as such principles are reasonably designed to effectuate the statutory policy (and, as we show, *infra*, pp. 11–13, the Board's *American Potash* criteria meet this test), the agency may apply them without further inquiry whether their application in a particular case would or would not further that policy. Indeed, the reason for promulgating such general rules is to avoid having to make that inquiry in each case, on the theory that an agency should be able to establish general policy standards that, in the long run, it believes will best effectuate the legislative design.

The criteria for determining when a craft unit is appropriate turn largely on policy considerations which the Board formulates on the basis of insight and experience gained from many cases (see pp. 7–9, *supra*), and their validity does not depend upon the facts of any particular case. Accordingly, we submit that the Board, drawing upon its cumulative experience,[1] was fully justified in enunciating in the *Ameri-*

[1] Experience, however, was not the only basis for the Board's decision in *American Potash*. Before changing the craft unit criteria, the Board invited leading employer groups and unions to present their views. The National Association of Manufacturers, the United States Chamber of Commerce, the Ameri-

can Potash case a general rule that would henceforth apply in the establishment of craft units. The requirement in Section 9(b) that the Board decide the appropriate unit "in each case," therefore, does not preclude the Board, as the court below suggested (p. 28, *infra*) from "lay[ing] down the general rule that craft units rather than plantwide units best serve the interests of the employees and thereafter to apply the rule in subsequent cases." Cf. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. Indeed, even under *American Potash* the Board must still determine "in each case" whether the particular employees are members of a true craft and whether the union involved traditionally represents that craft.

3. The Board's *American Potash* principles are valid because they are designed to, and do, reasonably carry out the purpose and policy of the Act. The Board concluded after careful study that the denial

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can Federation of Labor, the Congress of Industrial Organizations, and many others filed briefs with the Board, and some participated in oral argument before the Board. The use of integration, bargaining history, and various other factors in determining the appropriateness of craft units was extensively and thoroughly examined.

Based on the record here, the Board decided that the electricians were skilled craftsmen, exercising their normal skills in their plant functions; that the Cumberland plant was sufficiently distinct from respondent's other plants so that the contract covering those plants could not be regarded as a bar to an election at Cumberland; that nothing was raised concerning integration or pattern of collective bargaining within the glass industry which had not heretofore been considered by the Board or which warranted a change in the *American Potash* policy; and that the electricians should have an opportunity to vote either for Electrical Workers or for Glass Workers (R. 23-27).

of craft units because of integration of operations or because bargaining in the industry was previously on a plant-wide basis does not adequately effectuate the purposes of Section 9(b)(2). Congress, in enacting this section, manifested "a deep concern * * * for the equities of craft employees and craft unions" (*American Potash, supra,* 107 NLRB at 1420), and intended to ease the path of craft employees to separate representation,[7] particularly in those integrated industries where the Board had previously been reluctant to establish craft units. In view of the large number of highly integrated industrial enterprises, many of which have a history of non-craft collective

[7] See, for example, the following excerpts from the legislative history of Section 9(b)(2):

"* * * Since the decision in the *American Can* case (13 NLRB 1252), where the Board refused to permit craft units to be 'carved out' from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain parts of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable." (Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., p. 12, 1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 418.)

"* * * This additional guaranty—recognizing and protecting, as it does, the rights and interests of individuals and minorities—will, it is believed, through wise administration result in a substantially larger measure of protection of those rights where bargaining units are being established than has heretofore been the practice." (House Conference Report No. 510 on S. 1126, 80th Cong., 1st Sess., p. 47, 1 Leg. Hist., p. 551.)

"All this bill does is to provide that such a previous finding shall not have that effect, and that if a year later the craft people want to form a separate union they shall have the same consideration at that time as they would have had if they had taken that action when the plant was first organized. In effect I think it gives greater power to the craft units to organize separately." (Senator Taft, 93 Cong. Rec. 3836, 2 Leg. Hist., p. 1009.)

bargaining, we submit that the Board was warranted in concluding that denying craft representation on those bases would tend to nullify the intent of Congress.

The *American Potash* criteria—which guarantee separate representation to all employees who can show that they constitute a truly skilled craft group, and that the union seeking to represent them is one which traditionally represents that craft—achieve the Congressional objective, without requiring the Board to establish a craft unit whenever one is requested. Moreover, the criteria themselves are reasonably related to the policy underlying the establishment of separate craft units, namely, to afford a group of employees with separate skills and problems an opportunity to select a representative who specializes in their problems and is therefore better qualified to handle them.[8]

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[8] The court below suggested (pp. 24, 26–27, *infra*) that the *American Potash* criteria are invalid because they transfer the responsibility for determining the appropriateness of a craft unit from the Board to the employees. But it was the Board which made the basic determination that it is appropriate to select craft units whenever the *American Potash* criteria are met, and it is the Board which determines, on the basis of these criteria, whether a craft unit is appropriate in a particular case. The long established *Globe* election procedure (p. 7, *supra*) (sustained in *National Labor Relations Board* v. *Underwood Machinery Company*, 179 F. 2d 118, 120–121 (C.A. 1)) is based upon the right of employees to choose for themselves between two appropriate units. The right of employees to decide whether they wish to be represented in a craft unit is also recognized in the proviso to Section 9(b)(2) that the Board shall not decide that a craft unit is inappropriate on the ground that a different unit has been established by a prior Board decision, "unless a majority of the employees in the proposed craft unit vote against separate representation" (*supra*, p. 3).

4. The court below further erred, we believe, in concluding that the application of the *American Potash* criteria to the plate glass industry was in any event arbitrary and discriminatory in view of the continued application of *National Tube* to four other industries with characteristics similar to the plate glass industry. It is well-settled that, in enunciating a change in policy, the Board has discretion to apply it retroactively or prospectively, depending upon which alternative would better effectuate the purposes of the Act. See *Optical Workers' Union* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963; *National Labor Relations Board* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 378–379 (C.A. 9); *National Labor Relations Board* v. *Katarik, Inc.*, 227 F. 2d 190, 191–192 (C.A. 8); *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 534 (C.A. 2). When the Board decided in *American Potash* to reverse the *National Tube* policy, it was justified in further concluding to apply the new rule prospectively and, in the interest of not disturbing existing bargaining patterns, to continue to apply the old rule to the four industries which were already operating under it. Contrary to the court's view (pp. 28–30, *infra*), it was not arbitrary for the Board to refuse to extend *National Tube* to the glass industry because the Board continues to apply *National Tube* not only to old plants in the four industries, but also to new plants. Given the continued application of *National Tube* to the four industries generally, it is desirable, in the interest of certainty and ease of ad-

administration, that a uniform rule be applied to all plants therein.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

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DECEMBER 1959.

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APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 7863

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, RESPONDENT, AND UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL–CIO, INTERVENOR

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

(Argued June 17, 1959. Decided September 2, 1959)

Before SOBELOFF, *Chief Judge*, and SOPER and HAYNSWORTH, *Circuit Judges*

SOPER, *Circuit Judge:*

This petition for enforcement of an order of the National Labor Relations Board relates primarily to a determination of the Board that the electricians, including shift, shop and electronics electricians, instrument labor men and apprentices in the employ of Pittsburgh Plate Glass Company constitute an appropriate craft unit for purposes of collective bargaining at its plant in Cumberland, Maryland, although they comprise a small minority of the employees and the operations of the plant are highly integrated.[1]

[1] At the time of the Board's decision the electrical group, operating under the supervision of the plant electrical engineer, consisted of 16 shift electricians, 6 shop electricians and 2 instrument labor men. It was anticipated that there would be approximately 55 electricians when the plant came to full production and that ultimately the plant would hire approximately 600 employees.

The present proceeding was brought when the Company refused to bargain with the Union as the representative of the group and charges were filed that the Company had violated § 8(a)(5)(1) of the statute. As the result of this proceeding the Board passed an order requiring the Company to bargain with the group and now seeks enforcement of the order.

The Company's plant commenced operations on September 8, 1956, before it was completely finished. On October 11, 1956, the International Brotherhood of Electrical Workers (Electrical Workers) filed a representation petition, pursuant to § 9(c) of the Act, requesting certification as the bargaining representative of the electricians at the plant. At that time the plant employees were not represented by any union. However, on November 8, 1956, the Company and the United Glass and Ceramic Workers of North America, AFL–CIO (Glass Workers), entered into an agreement whereby an existing collective bargaining contract between the Company and the Glass Workers at all of the other flat glass plants of the Company in this country was made applicable to the production and maintenance employees at the Cumberland plant. Thereupon the Glass Workers intervened in the representation proceeding and joined the Company in urging that the petition of the Electrical Workers should be dismissed because the integrated nature of the plant's operations and the history of bargaining at the Company's other plants, and in the plate glass industry generally, rendered any bargaining unit inappropriate other than one embracing all the production and maintenance employees.

On May 23, 1957, the Board rejected this contention and issued its decision and direction of an election. It based its conclusion on its decision in *American Pot-*

ash & Chemical Co., 101 N.L.R.B. 1418, wherein it held that the rights of separate representation should not be denied to members of a craft group merely because they were employed in an integrated industry and had previously adopted a pattern of bargaining on an industrial basis. Finding that the electricians formed a distinct group of skilled journeymen craftsmen, the Board concluded that it was an appropriate unit for collective bargaining. Accordingly, it directed an election among the employees of the group at which the Electrical Workers received 12 votes against 9 votes for the Glass Workers, and was therefore certified as the bargaining representative of the unit.

The power of the Board to determine the appropriate bargaining unit in a particular plant is derived from § 9(b) of the statute, 29 U.S.C. 159(b), which provides in relevant part that:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided:* That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation * * *.

The Board had occasion to consider the relative advantages of the plant unit as opposed to the craft unit in its decision in *National Tube Co.*, 76 N.L.R.B. 1199, on April 7, 1948. The Tube Company, a wholly owned subsidiary of the United States Steel Corporation, was engaged in the manufacture and sale of steel

and tubular products at several plants in various parts of the United States. Only the plant at Lorain, Ohio, was involved in the case. The Bricklayers, Masons and Plasterers International Union of America, AFL, petitioned the Board to establish a craft unit of bricklayers and apprentices at the plant. The United Steel Workers of America, AFL, intervened and joined the Company in opposing the Bricklayers' petition. The United Steel Workers had been certified in 1942 as the exclusive bargaining representative for a multiple plant unit of the Company's production and maintenance employees and thereafter had bargained for them under a series of collective bargaining agreements following, in this respect, the pattern of collective bargaining generally in the steel industry. No unit confined to bricklayers had ever been established among the employees in any operation of the United States Steel Corporation or in any of the plants of the sixty-five other companies engaged in the production of basic steel. The Bricklayers contended that § 9(b)(2) of the Act removed from the Board's discretion not only the power to rely on a prior decision as the basis for finding a craft unit inappropriate, but also the power to find such a unit inappropriate by reason of collective bargaining history or any other circumstances upon which the Board had been accustomed to rely. The basis of this contention consisted of various statements found in the legislative history preceding the passage of the amendment of the Act. The Board overruled this contention on the ground that the proviso was not ambiguous and did not limit the Board's discretion to find a craft unit inappropriate so long as there was no reliance on a prior Board determination. It therefore held that the legislative history was not controlling; but it also held, upon an examination of the legislative

history, that "there is no basis for finding a Congressional intent to prohibit the use of a prior Board determination or any bargaining history based thereon as a factor to be considered so long as neither is made the sole ground upon which the Board predicates its decision." Coming to the merits of the case, the Board concluded that the bargaining history of an industry was a "weighty factor" to be considered by the Board in making its decision. It found that the bricklayers in the plant, unlike usual craft maintenance employees, were engaged in a definite program of replacing and repairing instrumentalities used in the continuous production of basic steel and that their functions were therefore intimately connected with the steelmaking process. It also found that the bricklayers and steel production employees enjoyed similar working conditions and had been represented together under a series of bargaining agreements between the employer and the United Steel Workers and that, because of the integrated nature of the operations in the industry, any change in the unit governing the bargaining relations between the employer and its employees would be detrimental to the basic wage-rate structure underlying the operations and would necessarily have an adverse effect upon the productive capacity in an industry of national concern. It therefore denied the Bricklayers' petition for separate representation.

Subsequently the Board made similar rulings affecting three other integrated industries, that is, the wet milling industry in *Corn Products Refining Co.*, 80 N.L.R.B. 362, Nov. 18, 1948, the lumber industry in *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 1076, Dec. 16, 1949, and the aluminum industry in *Permanente Metals Co.*, 89 N.L.R.B. 804, April 27, 1950. In each of these cases the Board emphasized the need for col-

lective bargaining on an industrial basis where the industry involved is highly integrated and its basic operations are interdependent.

On March 1, 1954, however, in *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, the Board reversed this policy. This case involved an employer engaged in the manufacture of various basic chemical products by a continuous flow process and the operations demonstrated the same type of integration as was found to exist in basic steel. The United Mine Workers of America (AFL) had been the bargaining representative of the employees on a plantwide basis since 1941 and the continuance of a plantwide bargaining unit was sought by the employer and certain other unions. Separate bargaining units, however, were sought by other unions for the electricians, the engineering department, the pump packers and oilers, the riggers, and the tool room keepers. In considering these conflicting contentions, the Board referred to its decision in the *National Tube* case and held that it had had the effect of permanently foreclosing the possibility of establishing craft units in an entire industry by freezing the industry into an industrial unit for bargaining purposes, and it concluded that this result was inconsistent with the legislative intent manifested in § 9(b)(2) of the statute. The Board found it necessary to re-examine the legislative history and in so doing came to a conclusion directly opposite to that which it reached in *National Tube*. It held that Congress had taken the position that the specific interests of members of a skilled craft outweigh the community of interests that exist among employees in general, and that the right of separate representation should not be denied the members of a craft group merely because they are employed

in an industry which involves highly integrated product processes and in which the prevailing pattern of bargaining is industrial in character. It announced that it would not extend the practice of denying craft severance on an industrywide basis.

In overruling its decision in *National Tube*, the Board said:

> In adopting this new rule, we have given grave consideration to the argument of employer and union groups that fragmentation of bargaining units in highly integrated industries which are characteristic of our modern industrial system can result in loss of maximum efficiency and sometimes afford an opportunity for jurisdictional disputes as to work assignments. We are cognizant of the disruptive economic and social conditions that can and sometimes do occur as the result of craft existence in industrial plants, as where, for example, a small cohesive craft group, by striking, closes down a large industrial plant employing thousands of workers. The alternative, however, is to deny crafts separate representation, and experience has shown that this approach, which was predominant under the *American Can* decision,[2] was no less productive of labor unrest.
>
> The lesson which we draw is that, consistent with the clear intent of Congress, *it is not the province of this Board to dictate the course and pattern of labor organization in our vast industrial complex. If millions of employees today*

[2] In that decision (13 N.L.R.B. 1252), the Board held that a history of bargaining in a plant-wide unit might, *of itself*, provide sufficient basis for denying a subsequent request for separate craft representation. The limitation in Section 9(b)(2) of the amended Act (p. 6, supra) reflects Congress' disapproval of this practice. See Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 417–418, 1009.

feel that their interests are better served by craft unionism, it is not for us to say that they can only be represented on an industrial basis or for that matter that they must bargain on strict craft lines. All that we are considering here is whether true craft groups should have an opportunity to decide the issue for themselves. We conclude that we must afford them that choice in order to give effect to the statute. Whatever may be lost in maximum industrial efficiency, and experience has not shown that this loss is measurably greater than that which flowed from the rigid doctrine of *American Can*, is more than compensated for by the gain in industrial democracy and the freedom of employees to choose their own unions and their own form of collective bargaining. [Emphasis supplied.]

In adopting our new rule, we wish to make it clear that the requirement that the unit sought to be severed must be a true craft group will be rigidly enforced in cases where severance is sought on that basis. We propose to exercise great care in making certain that in the administration of this rule only groups exercising genuine craft skills will be embraced within the ambit of the rule; and that the requirements will not be relaxed over a period of time. We feel that the problem is one of administration rather than concept. We are also of the opinion that under the rule we are adopting fewer groups will be severed but that, at the same time, the principle of craft independence will be maintained.

We understand this decision to mean, as pointed out by a dissenting member of the Board, that the Board has adopted the flat rule that craft units must be split off from an established industrial unit whenever requested by a union that traditionally represents employees in the craft and that this rule is to be applied

irrespective of the nature or the degree of integration in the industry and irrespective of the estalished practice of collective bargaining prevailing in the industry. Moreover, we understand that this rule has been adopted in deference to the views expressed on the floor of Congress when § 9(b)(2) of the Act was under consideration by that body, and in deference to the wishes of craft employees who feel that their interests are better served by craft unionism, and that the interests of millions of employees who prefer to bargain on a plant-wide basis are not to be taken into consideration. Indeed, the Board seems to abdicate its authority in the premises, for it says that "under the circumstances indicated, * * * it is not for us to say that they [the craftsmen] can only be represented on an industrial basis or for that matter they must bargain on strict craft lines. All that we are considering here is whether true craft groups should have an opportunity to decide the issue for themselves. We conclude that we must afford them that choice in order to give effect to the stafute."

In subsequent decisions, the Board has repeatedly adhered to this policy. If in a given case it is shown that certain employees are members of a craft and desire to be represented by an appropriate craft union, that is the end of the matter. No other evidence is considered and the wishes of the craftsmen are given effect, unless indeed it appears that the plant is engaged in one of the four favored industries referred to above. See *U.S. Smelting Refining & Mining Co.*, 116 N.L.R.B. 661, 663; *Bay City Division, Dow Chemical Co.*, 116 N.L.R.B. 1602, 1605; *General Refractories Co.*, 117 N.L.R.B. 81, 83; *Bethlehem Pacific Coast Steel Corp., Shipbuilding Division*, 112 N.L.R.B. 579, 581.

The decision of the Board follows the same pattern in the case at bar. Rejecting the contention of the Company and the Glass Workers that the petition to recognize the electricians as a separate craft unit should be dismissed because of the integrated nature of the Company's operations and the previous pattern of collective bargaining on an industrial basis in the flat glass industry, the Board said:

> * * * We find no merit in this contention. In *American Potash & Chemical Corporation*, 107 N.L.R.B. 1418, the Board clearly stated that it will not further extend the National Tube doctrine beyond those industries in which it had already been applied, and recently the Board has reiterated this policy on several occasions. Moreover, there is nothing raised herein concerning integration or pattern of collective bargaining within the glass industry which has not been heretofore considered by the Board, or which warrants a change of our established policy.

The departure of the Board from established principles in this new approach is manifest. The Board was right, in the first instance, in reaching the conclusion that the addition of subsection 2 of § 9(b) created no ambiguity. As amended § 9(b) does not strip the Board of its original power and duty to decide in each case what bargaining unit is most appropriate to assure to the employees the fullest freedom in collective bargaining, whether it be an employer unit, craft unit, plant unit or subdivision thereof. It merely tells the Board that it must not decide that a craft unit is inappropriate in a particular case on the ground that a different unit had been established by it in a prior determination. In effect it frees the Board from the domination of its past decisions and directs it to reexamine each case on its merits and leaves it free to select that unit which it

deems best suited to accomplish the statutory purposes. Undoubtedly the legislative debates and the committee reports indicated dissatisfaction on the part of members of Congress with the rigid attitude of the Board in adhering to its prior decisions; but Congress clearly did not command the Board, as it could have done,[3] to establish a craft bargaining unit whenever requested by a qualified craft union, or relieve the Board of its duty to consider the interests of the plant unions and the wishes of the employees who desire to bargain on a plantwide basis. The amended section expressly requires the Board to decide *in each case* what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace.

The Board was not authorized by the amendment to surrender to anyone else its statutory duty to determine in each case the appropriate unit for collective bargaining. It had been set up by Congress as an independent body presumed to possess expert knowledge and wisdom in the field superior to that of the courts or of Congress or of the active participants in the industrial world and therefore better fitted than anyone else to decide what would best serve the working man in his effort to bargain collectively with his employer, and what would best serve the interest of the country as a whole. Yet, as we have seen, the Board declared in *American Potash* that it was not for it to say whether the employees should be represented on an industrial basis or must bargain along

[3] During the Senate hearings representatives of labor unions urged that § 9(b) be amended to require the establishment of craft units in all cases unless a majority of the craftsmen involved decided otherwise. See Hearings Before Senate Committee on Labor and Public Welfare on S. 55, 80th Cong. 1st Sess., p. 1007 et seq. and p. 1052; 2 Leg. Hist. of Labor Management Relations Act (1947) p. 1009.

strict craft lines, but that it must allow the employees the right to make the choice. In other words, the Board now reads into the statute the amendment urged upon but rejected by Congress. This does not seem to be a proper exercise of the duty of the Board to select an appropriate bargaining unit. In *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 156, involving the same employer now before us in the instant case, the Court sustained the Board in overruling the wishes of a large majority of the employees in one of the Company's plants who desired to be represented by their own union and in holding that a single organization should represent the employees in all of the Company's plants. The Court said:

> * * * the availability of a workers' organization for purposes of representation is not in itself decisive in determining the appropriate bargaining unit. Naturally the wishes of employees are a factor in a Board conclusion upon a unit. They are to be weighed with the similarity of working duties and conditions, the character of the various plants and the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining. * * *

There can be no doubt as to the breadth of the Board's power and discretion to select the appropriate bargaining unit for the employees in each case. The determination rests in the sound discretion of the Board and will not be disturbed unless it is arbitrarily and unreasonably exercised. *May Department Stores* v. *N.L.R.B.*, 326 U.S. 376, 380; *N.L.R.B.* v. *Libbey-Owens-Ford Glass Co.*, 4 Cir., 241 F. 2d 831, 834.[1]

---

[1] This case related to the libre glass industry and there was no showing that this industry is integrated as is the flat glass industry involved in the case at bar.

Moreover, it has been held that the Board may, in its discretion, change its policies from time to time in order to effectuate the purposes of the Act. *N.L.R.B.* v. *Kobritz*, 1 Cir., 193 F. 2d 8; *N.L.R.B.* v. *National Container Corp.*, 2 Cir., 211 F. 2d 525, 534; *Optical Workers* v. *N.L.R.B.*, 5 Cir., 227 F. 2d 687, 691; *N.L.R.B.* v. *Stanislaus Implement Co.*, 9 Cir., 226 F. 2d 377, 378. The Supreme Court has said that administrative agencies have the choice, in their informed discretion, to proceed by general rule or by ad hoc decisions. *Securities Exchange Commission*, 332 U.S. 194, 200–203; *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 348. Hence the Board contends that it had the power in the *American Potash* case to lay down the general rule that craft units rather than plantwide units best serve the interests of the employees and thereafter to apply the rule in subsequent cases. Such a rule or policy, it has been said, is formulated in the exercise of the legislative power of the Board as distinguished from its adjudicative function of finding the facts of a particular case. See 2 Davis, *Administrative Law*, p. 353.

It is obvious, however, that the Board may not be arbitrary in the exercise of its functions to promulgate a policy applicable to any class of cases. That was strikingly shown in the decision of the Supreme Court in *Office Employees International Union* v. *N.L.R.B.*, 353 U.S. 313, where it was held beyond the power of the Board to refuse to assume jurisdiction over an entire class of employers consisting of labor unions actively engaged as employers of workers. See also *Hotel Employees* v. *Leedom*, 358 U.S. 99.

In our opinion the action of the Board in formulating the policies described above and in applying them in the pending case was arbitrary and discriminatory. Instead of selecting an appropriate bargaining union

after a study of the circumstances of the case before it, it followed its announced policy of acceding to the wishes of a small group of employees, comprising a craft, for separate representation, although potent reasons existed for the plantwide representation desired by the employers and the great majority of the workers. Conceivably such a decision could be justified by the circumstances of a given case, but in this instance it must be condemned as discriminatory, in view of the conflicting policy and action of the Board in denying craft representation and directing plantwide representation under precisely similar circumstances in certain selected fields.

We find no reasonable explanation for the discrimination. The exclusion of the steel, lumber, aluminum, and wet milling industries from the craft union rule was based by the Board on two facts: first, that in each case the industry was thoroughly integrated and second, that it had had a long history of plantwide bargaining. But precisely the same conditions exist in the plate glass industry, with which we are now concerned, since it is as much if no more integrated than those in the favored group and has an unbroken history of plantwide bargaining. The Board itself makes no attempt to distinguish between it and the favored group. It excuses its discrimination on the ground that it had previously approved plantwide bargaining in each of the four and that "it would not be wise or feasible to upset a pattern of bargaining already firmly established." This argument however defeats itself, for the pattern of plantwide bargaining in the plate glass industry is as firmly established as in any other and if it is disrupted by the automatic extension of craft union bargaining, the ensuing confusion and disturbance of industrial

peace are as likely to occur as they would be in the industries which the Board protects.

This discrimination in favor of the four industries cannot be passed over as past history which cannot now be corrected, for the Board persists in denying craft representation in the selected four in new cases that come before it. A recent summary of the Board's rule is found in its Twenty-Third Annual Report for the Fiscal Year Ended June 30, 1958 at pages 35–36 as follows:

> The Board announced during the past year that the *National Tube* doctrine, under which separate craft or departmental representation had been denied in certain industries, viz. basic steel, basic aluminum, lumber, and wet milling, is applicable not only in the case of plants with a prior industrial bargaining history but also where new plants in those industries are involved.
>
> However, adhering to the policy announced in the *American Potash* case, the Board has again declined to extend the *National Tube* doctrine and has permitted separate craft or departmental representation, regardless of integration of operations, in all industries other than basic steel, basic aluminum, lumber, and wet milling. [Footnotes omitted.]

Plainly the new plants bear the same relation to the older plants of the four industries as the Cumberland plant bears to the older plants of the Pittsburgh Plate Glass Company; but here again the Board offers no explanation for its inconsistent actions. Its policy with respect to the four industries is solely based, so far as we can see, on its prior determination that in these industries craft representation will not be tolerated. This position is not only open to the objections hereinbefore outlined, but plainly constitutes a violation of the

express provision of § 9(b)(2) of the statute, which forbids the Board to decide that any craft unit is inappropriate on the ground that a different unit has been established by a prior Board determination.

We reach the conclusion that the Board's order should not be enforced, and have no occasion to consider the additional defense of the Company that enforcement of the order should be denied because one of the officers of the local union failed to file the affidavit required by § 9(h) of the statute.

Enforcement Denied.

United States Court of Appeals for the Fourth Circuit.

No. 7863.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

PITTSBURGH PLATE GLASS COMPANY, RESPONDENT, AND UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL–CIO, INTERVENOR

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Pittsburgh Plate Glass Company, its officers, agents, successors and assigns, on the 4th day of September, 1958, in proceedings before the Board entitled "Pittsburgh Plate Glass Company, Employer and International Brotherhood of Electrical Workers, AFL–CIO, Petitioner, Case No. 5–RC–2088", and Pittsburgh Plate Glass Company and International Brotherhood of Electrical Workers, AFL–CIO, Case No. 5–CA–1208"; upon the answer of respondent; motion of

United Glass and Ceramic Workers of North America, AFL–CIO, for leave to intervene; answer of United Glass and Ceramic Workers of North America, AFL–CIO; the transcript of the record in said proceedings, certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the motion for leave to intervene be, and it is hereby, granted; and that the petition for enforcement filed by the National Labor Relations Board in this cause be, and the same is hereby, denied.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.

Filed Sept. 2, 1959.

R. M. F. WILLIAMS, Jr.,
Clerk.

A true copy.
Teste:

RICHARD M. F. WILLIAMS, Jr.,
Clerk, U.S. Court of Appeals
for the Fourth Circuit.

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FILE COPY

FILED
DEC 30 1959

No. 559.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PITTSBURGH PLATE GLASS COMPANY and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO,
Respondents.

BRIEF OF RESPONDENT, UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT, UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

1. Did the Board act arbitrarily in establishing and applying the rule that in any industry other than the four favored ones (basic steel, wet milling, lumber and aluminum) it would pay no attention whatsoever to the nature or degree of integration in the plant involved, the nature or degree of integration in the industry and to the established practice of collective bargaining prevailing in the industry?

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2. Did the Board deprive the Glass Workers Union of due process and the equal protection of the laws by the discrimination practiced by it in always considering the factors of integration and industry practice an absolute bar to craft severance even in new plants in the four favored industries while at the same time refusing to give any consideration to the same factors in the plant involved in this case?

3. If the National Labor Relations Act, as amended does permit such a discrimination as practiced by the Board in this case, is the Act to that extent unconstitutional?

ARGUMENT.

Although the Court of Appeals in denying enforcement of the Board's Order placed it in the statutory context that the Board by the merely formal application of its rigid craft-severance rule had failed to comply with the statutory duty to determine *in each case* the appropriate unit for collective bargaining, that is not the only approach to this case.

Throughout the proceedings the Glass Workers Union had argued that to deny all craft-severance petitions in all plants (both old and new) in only four industries (basic steel, wet milling, lumber and aluminum) and to grant craft-severance petitions in all other industries is an invalid discrimination and deprives the Glass Workers Union of due process and equal protection of the laws.

Even the Solicitor General concedes that there are a "large number of highly integrated industrial enterprises". (Petition, p. 12).

Why the nature or degree of integration of operations in the plant involved should be considered a decisively material factor against craft severance in only four of the "large number of highly integrated" industries and an utterly immaterial factor in the remaining highly integrated industries is attempted to be justified on only one ground—in the interest of certainty and ease of administration.

This Court has rejected such an argument where it resulted in similar unjust discrimination. *Office Employees International Union* v. *N.L.R.B.*, 353 U. S. 313 (1957), and *Hotel Employees* v. *Leedom*, 358 U. S. 99 (1958). In the first cited case this Court pointed out that to place labor unions in the same category as such nonprofit employers as religious, educational and eleemosynary employers "is entirely unrealistic for the very nature of the excluded nonprofit employers is inherently different from that of labor unions and the reason for such exclusion has no applicability to union activity • • •." Although this Court may recognize the right of the Board to classify industries, plants, and employers into groups, such "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [cases]. The classification • • • must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." *Colgate* v. *Harvey*, 296 U. S. 404 (1935).

We submit that the decision of the Court of Appeals was correct.

Conclusion.

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

SAMUEL L. ROTHBARD,
Counsel for United Glass and Ceramic Workers of North America, AFL-CIO, Respondent.

ABRAHAM L. FRIEDMAN,
Of the New Jersey Bar.

FILE COPY

No. 559

In the

Supreme Court of the United States

October Term, 1959

National Labor Relations Board,
Petitioner,

v.

Pittsburgh Plate Glass Company,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 270 F. (2d) 167 and is set forth at pp. 16-31 of the appendix to the petition for certiorari ("Pet.") herein. Two decisions of the National Labor Relations Board are involved: 1. The decision and order of the Board in Case No. 5-CA-1208, reported at 121 NLRB 758 (B.A.[1] 14-17), hereinafter called the unfair labor practice case; and 2. The decision and direction of election of the Board in

---

[1] "B.A." and "C.A." references are to the Board's and Respondent's appendices, respectively, filed in the Court of Appeals. Nine copies of such appendices have been filed with the clerk of this Court pursuant to Rule 21(4).

Case No. 5-RC-2088, reported at 117 NLRB 1728 (B.A. 21-27), hereinafter called the representation case.

JURISDICTION

The jurisdictional requisites are appropriately set forth in the Petition.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court of Appeals correctly denied enforcement to an order of the National Labor Relations Board directing Respondent, a plate glass manufacturer, to bargain with a craft unit of twenty-three workers, the Board having previously refused, and continuing to refuse, to create such a craft unit in four other industries where integration of operations and history of collective bargaining—the factors upon which the Board relied to deny a craft unit in such other industries—are substantially identical with such factors in the plate glass industry.[2]

---

[2] In its *National Tube* decision, 76 NLRB 1199, decided April 7, 1948, the Board held that in the basic steel industry, because of integration of operations and long history of plant-wide bargaining, no craft unit would be allowed. Subsequently the Board included within its ruling three other integrated industries—basic aluminum, lumber and wet milling (Pet., p. 20). But in *American Potash*, 107 NLRB 1418, decided March 1, 1954, the Board held that in all other industries, despite integration of operations and long history of plant-wide bargaining, craft units would be allowed and it applied that doctrine in the instant case. However, the Board continues to disallow craft units in the aforementioned four industries, while permitting them in all other industries despite identity of integration and history of collective bargaining.

2. Whether Respondent was entitled, during the course of the unfair labor practice case, to show that the interested union was not in compliance with Section 9(h) of the Act (which at that time required the filing of certain non-communist affidavits) and thereby to establish the Board's want of jurisdiction. The Court below did not find it necessary to decide this question since it denied enforcement to the Board's order on the ground that the Board's craft unit determination was arbitrary and discriminatory.

STATUTORY PROVISIONS INVOLVED

This case arises under the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Sec. 151 *et seq.* Pertinent provisions of the Act are set forth in the appendix hereto (pp. 17-19).

STATEMENT OF THE CASE

There are facts in the case in addition to those set forth in the petition for certiorari which should be brought to the Court's attention.

(a) Facts As To Manufacture Of Plate Glass and History Of Collective Bargaining In Plate Glass Plants.

The Court below correctly found (Pet., pp. 16, 29) that the operations of Respondent's plate glass plant are highly integrated—indeed more integrated than those in the four industries (steel, aluminum, lumber and wet milling) selected by the Board for special treatment. In those industries the Board does not allow craft units. In the plate glass industry where integration is identical with, or greater than, integration in the selected industries, and where the history of plantwide bargaining is even longer than in the selected industries, the Board seeks to require a craft unit (Pet., p. 29).

The record establishes these facts and they are conceded by the Board. Thus, as to integration of operations the record shows that sand, soda ash and limestone are the principal raw materials in glass making. These materials are automatically weighed and mixed in a batch house; automatically conveyed to a tank furnace; and automatically fed to the furnace, which is a refractory lined structure, 30 feet wide and 150 feet long, holding a depth of four feet of molten glass (C.A. 3-9). The batch materials are melted and refined in the furnace continuously and without interruption 24 hours a day, seven days a week for varying periods of three or more years, depending upon the life of the refractories (C.A. 10, 16, 17). At the outlet lip of the tank, the molten glass has sufficient viscosity to be drawn horizontally between forming rolls that impart relatively uniform thickness and width to a ribbon of glass, which cools and anneals as it passes through a long oven called a lehr (C.A. 10, 11-12). Still a continuous ribbon, the glass is ground simultaneously on the upper and lower surfaces to impart parallelism and is then polished to provide its ultimate transparency (C.A. 19-21).

In Respondent's plant, as in all plate glass plants, the technology is heavy, highly mechanized, and continuous. No hand need touch the glass from the moment the batch materials enter the furnace until the moment the glass is cut into customers' sizes and boxed for shipment. The total distance between the initial formation of the ribbon of glass and the point at which it is cut into customers' sizes is approximately one-third of a mile. The production line is one continuity (C.A. 25 and Co's Exh. 1, C.A. 121).[3]

[3] The record contains other convincing evidence of the integrated and continuous nature of Respondent's process of making plate glass particularly as related to the employees in the unit here involved (C.A. 12-14, 16, 18, 19-23, 31-60, 69-86, 89-100, 104-107, 112-115; B.A. 51-52, 55).

Plate glass production is much more integrated than steel production, which is merely a process of tapping and filling (C.A. 65, 66). Shutting down a blast furnace in steel for several hours or even a full day is not critical (C.A. 59-60). The furnace is often banked and can be started again in a few hours without damage (C.A. 63-64). However, in plate glass production even a few minutes interruption in the glass tank, as through an electrical failure, creates serious difficulties and may result in shutting the tank for several months (C.A. 9, 59-61, 67-68). The reason is that even a slight cooling of the tank may cause its walls to contract and possibly cave in. The whole tank can be lost (C.A. 51, 63). Briefly put, a breakdown of equipment in steel merely means loss of production, while in plate glass it presents the risk of loss of capital equipment.

For 25 years Respondent has bargained with the United Glass and Ceramic Workers of North America, AFL-CIO ("Glass Workers") as the collective bargaining representative of all of its employees, including electricians, in its plate glass plants (C.A. 32-34, 108, 112). In all of that time Respondent has operated three plate glass plants located respectively at Creighton and Ford City, Pennsylvania and at Crystal City, Missouri (B.A. 23, note 5).[4] There has never been a craft unit at any of these plate glass plants; nor has there ever been a craft unit in any plate glass plant in the entire plate glass industry in the United States (C.A. 32-34, 108).

In 1939 the Board certified the Glass Workers as the collective bargaining representative of all production and maintenance employees in Respondent's plate glass plants. *Pittsburgh Plate Glass Co.*, 10 NLRB 1111. This unit determination was reviewed and sustained by the Court in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, where the Court rejected a contention that one whole plate glass

[4] In 1956 the plant involved here was put into operation at Cumberland, Maryland (B.A. 22).

plant of Respondent should be set up as a separate unit, holding that this would frustrate division-wide effort at labor adjustments. 313 U.S. at 164. This forms a striking contrast to what the Board seeks to do here in establishing as a separate unit a tiny craft segment of a highly integrated plant, contrary to twenty-five years of plant-wide collective bargaining in the plate glass industry.

(b) Facts As To Charging Union's Non-Compliance With Section 9(h)[5] Of The Act.

In both the representation and unfair labor practice cases, Respondent sought to show that a particular individual was an officer of Local 307 of the International Brotherhood of Electrical Workers ("Electrical Workers"), the charging union herein, and that he had not filed the non-communist affidavit required by Sec. 9(h) of the Act (B.A. 15 (note 3), 18-21, 22 (note 4); C.A. 117-119, 122-123). As found by the Board, Local 307 assisted in the organization of the employees in the certified unit at Respondent's plant (B.A. 2, 15, 22 (note 4)), and admits them into membership (B.A. 2, 15; C.A. 100-101). Furthermore, it intends to serve them if the Board's certification is upheld (B.A. 61). At all times, Respondent was precluded from litigating its contention respecting the non-compliance of Local 307 (B.A. 2, 3, 15 (note 3), 19; C.A. 118, 122) and the Board admitted as much in its brief below. The record is thus uncontradicted that an officer of Local 307 did not in fact file the affidavit re-

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[5] Effective Sept. 14, 1959, Sec. 9(h) was repealed by Sec. 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 86th Cong. Such repeal was not made retroactive. Accordingly, since the events upon which Respondent relies occurred before the repeal of Sec. 9(h) and show a clear violation of that section, Respondent may rely upon them to establish the Board's want of jurisdiction herein. *Du-Wel Decorative Co.*, 125 NLRB No. 5 (November 9, 1959); *Danville Silk Co.*, 45 LRRM 1128 (November 27, 1959).

quired by Sec. 9(h) of the Act (B.A. 18-21; C.A. 117-119, 122-123).

(c) Decision Of The Court Of Appeals.

The Court of Appeals refused to enforce the Board's order, holding that the Board's action in issuing the order was arbitrary and discriminatory. This arbitrary and discriminatory action occurred when the Board automatically applied in this case its rule laid down in *American Potash & Chemical Corp.*, 107 NLRB 1418 that, except in the four selected industries (steel, aluminum, lumber and wet milling), it would allow craft units no matter how integrated the operations and no matter what the pattern and history of collective bargaining in the plant or industry (Pet., p. 24). The Court of Appeals said below:

> "Instead of selecting an appropriate bargaining union (*sic*) after a study of the circumstances of the case before it, it followed its announced policy of acceding to the wishes of a small group of employees, comprising a craft, for separate representation, although potent reasons existed for the plantwide representation desired by the employers and the great majority of the workers. Conceivably such a decision could be justified by the circumstances of a given case, but in this instance it must be condemned as discriminatory, in view of the conflicting policy and action of the Board in denying craft representation and directing plantwide representation under precisely similar circumstances in certain selected fields." (Pet., pp. 28-29)

The Court of Appeals added that there was no reasonable explanation for the discrimination. The same conditions existed in the plate glass industry as caused the Board to deny craft units in the four selected industries (steel, aluminum, lumber and wet milling), namely, integration of operations and long history of plant-wide bargaining (Pet., pp. 29-30). The Court of Appeals said:

> "This discrimination in favor of the four industries cannot be passed over as past history which cannot now be corrected, for the Board persists in denying craft representation in the selected four in new cases that come before it" (Pet., p. 30).

See in this connection *Kaiser Aluminum and Chemical Corp.*, 119 NLRB 695, decided December 6, 1957.

The Court of Appeals also noted that Sec. 9(b)(2) of the Act does not order the Board to establish a craft bargaining unit whenever so requested by a qualified craft union. Indeed, Congress specifically rejected a proposal of the labor unions which would have required that result. The Court of Appeals further noted that this Court had previously ruled in *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156, that the wishes of employees were not controlling in unit determinations (Pet. pp. 26-27).

And finally, the Court of Appeals rejected the Board's attempt to discriminate in favor of plantwide bargaining in the four selected industries while pretending to "lay down" in *American Potash* a general rule in favor of craft units in all other industries (Pet., p. 28).

ARGUMENT

The decision of the Court below was plainly correct; there is no conflict of decision; and in any event the failure of the interested union to comply with Sec. 9(h) of the Act requires affirmance of the judgment below so that the Court need not pass upon the question on which the petitioner seeks review.

I.

The Decision Below Is Manifestly Correct

The Board's authority to determine the appropriate bargaining unit in any case is derived from Section 9(b)

of the Act which requires it to "decide in each case" what unit will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." This Court decided in 1941 that although the wishes of employees are one of the factors to be considered, they do not control unit determinations. *Pittsburgh Plate Glass Co.* v. *NLRB*, *supra*, p. 8. Moreover in deciding whether to allow craft units in a given case, the Board itself has recognized that it must balance two conflicting considerations: (a) the maintaining of industrial peace through adherence to existing bargaining relationships and (b) the indulging of the desire of a group of craftsmen to be represented separately. Until its decision in *American Potash*, the Board considered various criteria in determining this issue, some of the more important of which were:[6] (a) the employer's history of bargaining; (b) the history, extent, and type of organization of employees in other plants of the employer and of other employers in the same industry; (c) the relationship between the proposed unit and the employer's method of managing and operating the plant; and (d) the maintenance by the group seeking separate representation of its identity as a craft group despite a history of bargaining on a more comprehensive basis. Had the Board applied these, its usual criteria, in the instant case, it would have denied the craft unit sought here. But instead the Board applied the automatic rule of *American Potash* that except for the four selected industries, craft units would be allowed however integrated the operations and whatever the history of bargaining in the plant or industry (B.A. 23-24).

The Board's ruling in *American Potash* was based on the misapprehension—which it repeats in the petition for certiorari (Pet., pp. 11-13)—that either it must allow craft units in all cases whenever requested by a craft

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[6] See *Hamilton & Sons*, 104 NLRB 627, 636.

union or that it must deny them in all cases. That dilemma, we submit, was and is of the Board's own creation. All the Board need do in any case, as suggested by the Court below (Pet., p. 29), is to apply the criteria it has itself evolved and decide "in each case" whether or not those criteria permit a craft unit.[7]

The Court below held that the Board's action in the instant case was arbitrary and discriminatory; that the Board may not discriminate between the steel, aluminum, lumber and wet milling industries on the one hand, and the plate glass industry, on the other, when the circum-

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[7] The Court below pointed out (Pet., p. 26, note 3) that during the Senate hearings on the bills that became the Taft-Hartley Act, representatives of labor unions urged that Sec. 9(b) be revised to make mandatory the establishment of craft units in all cases unless a majority of the craftsmen involved voted against separate representation. *Hearings before Senate Committee on Labor and Public Welfare on S. 55 etc., 80th Cong., 1st Sess.*, pp. 1007 et seq. (1947). Their proposal was not adopted. See also Senator Taft's explanation on the floor of the Senate that Section 9(b) does not "go the full way of giving them (the craftsmen) an absolute right in every case". 2 *Legislative History of Labor Management Relations Act* (1947), p. 1009. Thus, even though Congress, in enacting the Taft-Hartley Act, did facilitate the establishment of craft units, it did not require the Board to permit them automatically in all cases. Instead, it required the Board to make its unit determination "in each case" limited only by the requirement in Section 9(b)(2) that it not give controlling effect to any prior determination by the Board *against* craft units.

Despite the foregoing Petitioner persists, as the Court below pointed out (Pet., p. 27), in reading into the statute the labor union proposals mentioned above.

stances in all these industries are the same. (Pet., pp. 28-29). In order to act fairly and not arbitrarily, the Board must accord to the factors of integration and past bargaining history in the plate glass industry the same weight as it gives these factors in the four selected industries.

The Court of Appeals correctly pointed out that the Board has broad power and discretion to select the appropriate bargaining unit in each case and its "discretion . . . will not be disturbed unless it is arbitrarily and unreasonably exercised." *May Department Stores* v. *NLRB*, 326 U.S. 376, 380 . . ." (Pet., p. 27). And the Board may make distinctions based on rational grounds. But when the factors that move the Board in one set of industries to reach a conclusion denying craft units are present also in another industry, then the Board must deny such craft units in that other industry. Due process requires no less. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Wallace* v. *Currin*, 95 F. (2d) 856, 867 (C.A. 4) *aff'd* 306 U.S. 1; *Missouri Pacific R. Co.* v. *Mackey*, 127 U.S. 205, 209; *Pfeiffer Brewing Co.* v. *Bowles*, 146 F. (2d) 1006, 1007 (Emergency App. Ct.) *cert. den.* 324 U.S. 865; *Sims* v. *Rives*, 84 F. (2d) 871, 878 (App. D.C.) *cert. den.*, 298 U.S. 683; *NLRB* v. *Gene Compton's Corp.*, 262 F. (2d) 653, 655 (C.A. 9); *NLRB* v. *Plankinton Packing Co.*, 265 F. (2d) 638 (C.A. 7).[8]

The Board contended before the Court below and repeats its contention here that it had the power in *American Potash* on the basis of policy considerations to lay

[8] See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585; *Currin* v. *Wallace*, 306 U.S. 1, 14; *Hirabayashi* v. *U.S.*, 320 U.S. 81, 100; *Bolling* v. *Sharpe*, 347 U.S. 497, 499. As these cases show, while the Fifth Amendment contains no equal protection clause, there may be discrimination of such an injurious character in the application of laws as to amount to a denial of due process.

down the *general rule* that craft units best serve the interests of employees. (Pet., pp. 9-11, 28). The difficulty with this argument is that in *American Potash* the Board did not lay down a *general rule*, because it created exceptions for the steel, aluminum, lumber and wet milling industries. As said in *Pfeiffer Brewing Co.* v. *Bowles*, *supra*, p. 11:

> "Class legislation discriminating against some and favoring others is prohibited. . . . the law must affect alike all persons in the same class and under similar conditions . . . classifications must embrace all who belong in the same category and may not be capricious or arbitrary."

As the Court below held (Pet., p. 28), the Board may not be arbitrary in the exercise of its functions to promulgate a policy applicable to any class of cases. This was strikingly shown, the Court added, in the decision of this Court in *Office Employees International Union* v. *NLRB*, 353 U.S. 313, where the Court held that the Board was without power on the basis of policy considerations to create an "arbitrary blanket exclusion" from its jurisdiction of union employers as a class, and that while it may decline jurisdiction on an *ad hoc* basis over nonprofit employers, it may not renounce jurisdiction over an entire category of employers. Likewise in *Hotel Employees* v. *Leedom*, 358 U.S. 99, this Court rejected the Board's renunciation of jurisdiction on the basis of policy considerations over the hotel industry as a class.

The Board also contended before the Court below, and repeats its contention here (Pet., pp. 14-15), that it was justified in not applying its *American Potash* rules to new plants in the four selected industries "in the interest of not disturbing existing bargaining patterns" and "in the interest of certainty and ease of administration." But these are not sufficient reasons to disregard the due process requirements of the Fifth Amendment. As the Court

below pointed out, the Board's "argument . . . defeats itself, for the pattern of plantwide bargaining in the plate glass industry is as firmly established as in any other and if it is disrupted by the automatic extension of craft union bargaining, the ensuing confusion and disturbance of industrial peace are as likely to occur as they would be in the industries which the Board protects" (Pet., pp. 29-30). In other words the Board's decisions on craft units must be identical where the facts are identical.

II

The Decision Below Is Correct In Any Event Because Respondent Was Under No Obligation To Bargain With The Electrical Workers On Account Of The Failure Of Its Local 307 To Comply With Sec. 9(h) Of The Act And Respondent Was Entitled To Show Such Lack Of Compliance In The Board Proceedings.

While the Court did not reach this issue, Respondent is of course free to urge any valid argument in support of the judgment below, including any contention not passed on by the Court below. *Langnes* v. *Green*, 282 U.S. 531, 535-539 and cases there cited.

1. Local 307 of the Electrical Workers was not in compliance with Sec. 9(h) of the Act. That local assisted in the organization of the employees in Respondent's plant, admits them to membership, and intends to serve them (*supra*, p. 6). Therefore, sec. 9(h) precluded the conduct of the representation proceeding that took place here and any certification resulting therefrom was a nullity. Respondent was thus relieved of any obligation to bargain with the Electrical Workers. *Brookings Plywood Corp.*, 100 NLRB 431; *U.S. Gypsum Co.*, 100 NLRB 1100; *International General Electric Co.*, 117 NLRB 1571; *Endicott Johnson Corp.*, 117 NLRB 1886; *Laundry Owners Ass'n*, 123 NLRB No. 77.

2. Compliance by Local 307 was litigable before the Board. *NLRB* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, where this Court held specifically that during an unfair labor practice proceeding an employer may show that a union has not complied with Sec. 9(h) and thereby establish the Board's want of jurisdiction.[9] The *Coca-Cola* case squarely controls this one because here, as there, Respondent sought to prove that a particular person, who had not filed an affidavit, was an officer—indeed a constitutional officer—of the union required to file such affidavit (*supra*, p. 6).[10]

3. Nor can the Board defend its failure to allow Respondent to show that Local 307 was not in compliance on the ground that it had administratively determined that Local 307 was in compliance. Such administrative determination is insufficient, when challenged in an unfair labor practice proceeding. *NLRB* v. *Eastern Mass. St. Ry.*, 235 F. (2d) 700, 706-707 (C.A. 1), *cert. den.*, 352 U.S. 951.

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[9] See too *Leedom* v. *Mine Mill Union*, 352 U.S. 145, 148-149 where this Court, referring to its *Coca-Cola* decision and earlier decision in *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322, again affirmed that the Board lacked jurisdiction in unfair labor practice cases if the charging union was not in compliance with Sec. 9(h).

[10] Several U.S. Courts of Appeals have since had occasion to apply the teaching of the *Coca-Cola* decision. *NLRB* v. *Eastern Mass. St. Ry.*, 235 F. (2d) 700, 706-707 (C.A. 1), *cert. den.*, 352 U.S. 951; *NLRB* v. *Puerto Rico Food Products*, 232 F. (2d) 515 (C.A. 1); *Shoreline Enterprises* v. *NLRB*, 262 F. (2d) 933, 939-941 (C.A. 5); *NLRB* v. *Lannom Mfg. Co.*, 243 F. (2d) 304, 306 (C.A. 6), *cert. den.*, 355 U.S. 822; *Goodman Mfg. Co.* v. *NLRB*, 234 F. (2d) 775 (C.A. 7) *cert. den.*, 352 U.S. 872. There have been no judicial decisions to the contrary since the *Coca-Cola* decision was rendered.

4. The Board's refusal to allow Respondent to litigate the question of whether a particular individual was an "officer" of the local union within the meaning of Sec. 9(h) and hence required to file an affidavit, is inconsistent with the position it took in allowing litigation over the meaning of other terms used in Sec. 9(h), such as "labor organization" or "affiliate". *Monsanto Chemical Co.*, 119 NLRB No. 6. Since the Board's position is thus contrary to the law as laid down by this Court and inconsistent with its own position in other comparable situations, it is entitled to no weight.

In sum, the record is clear under Respondent's offer of proof, which stands uncontradicted, that a constitutional officer of Local 307 had failed to file the affidavit required by Section 9(h) of the Act, although compliance by such local was admittedly essential to the Board's jurisdiction. And, as the *Coca-Cola* case holds, Respondent was entitled to show that the person who failed to file the affidavit was indeed an officer of Local 307. It follows, under the decisions of this Court in *Highland Park*, *Coca-Cola* and *Mine Mill*, that since Local 307 was not in compliance, the Board was without jurisdiction to investigate the representation petition, hold a hearing thereon, direct an election, certify the Electrical Workers, or issue the complaint which eventuated in the order which the Court below refused to enforce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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APPENDIX

The provisions of the National Labor Relations Act involved here are as follows:

1. Section 8(a)(5) which provides that

> "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

2. Section 9(a) which provides in relevant part

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . ."

3. Section 9(b) which provides in relevant part

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not . . . . . (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. . ."

4. Section 9(c)(1) which provides in relevant part

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in

their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

5. Section 9(h) which provides

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits." *

* While Section 9(h) was repealed by the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 86th Cong., the repeal was not retroactive. *Du-Wel Decorative Co.*, 125

6. Section 10(b) which provides in relevant part

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . ."

NLRB No. 5 (Nov. 9, 1959); *Danville Silk Co.*, 45 LRRM 1128 (Nov. 27, 1959). Failure of a charging union, as here, to comply with Section 9(h) deprived the Board of jurisdiction to proceed in this case.

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No. 559

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS CO., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF PITTSBURGH PLATE GLASS CO.

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In its brief in opposition, the Company does not deny that the question presented by the petition is important; it argues only that the decision below is correct. It further contends (Br. in Op. 13-15), however, that there is an alternative ground for sustaining the judgment below, namely, that the Board order was invalid because of the alleged failure of Local 307 to comply with the non-Communist affidavit requirements of Section 9(h) of the Act.

The court of appeals specifically declined to reach this issue (Pet. 31). As we now show, the contention is without merit.

Section 9(h) of the Act, as it existed at the time of the Board proceedings herein,[1] required, as a condition to the processing of a representation petition or an unfair labor practice charge, that there be a non-communist affidavit on file for each officer of the labor organization initiating the proceeding and of "any national or international labor organization of which it is an affiliate or constituent unit" (Co. Br. 18). The representation petition in this case was filed by the International Brotherhood of Electrical Workers; it was the union certified by the Board; and it filed the unfair labor practice charge (R. 61, 28, 1-2, 4). The Company does not deny that the Electrical Workers, and its parent body the AFL-CIO, were in full compliance with Section 9(h). Its contention relates solely to Local 307 of the Electrical Workers, which assisted the International in organizing the employees at the plant (R. 61). Since Local 307 did not initiate the Board proceedings, nor is it a "national or international labor organization," the terms of Section 9(h) itself did not require compliance by that entity. However, as a matter of policy, the Board has required compliance by the local, even when the representation petition has been filed by the International, where the local is expected to be a party to the contract which may ultimately be concluded.[2]

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[1] Section 9(h) has since been repealed by Section 201(d) of The Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519.

[2] See *Lane-Wells Company*, 77 NLRB 1051; *United States Gypsum Company*, 77 NLRB 1098; *Magnolia Petroleum Company*, 78 NLRB 1168.

The Company offered to prove before the Board, both in the representation and in the unfair labor proceedings, that Local 307 was not in compliance with Section 9(h) in that, shortly after the representation petition was filed, John Logue had succeeded Luther Hite as the Recording Secretary of Local 307 but had not filed a non-communist affidavit (R. 18-20). The Board rejected this offer in accordance with its policy that the *facts* concerning compliance with Section 9(h) may not be litigated in representation or unfair labor practice proceedings but are to be determined only in separate administrative proceedings. The Board, however, conducted its own administrative investigation into this question, on the basis of which it concluded that Local 307 was in full compliance with Section 9(h) at all times relevant to the proceedings (R. 15, n. 3, 22, n. 4).[3]

We submit that, in these circumstances, the Board correctly declined to permit litigation in this proceeding of the sufficiency of Local 307's compliance with Section 9(h). The issue which the Company sought to raise did not involve any question as to the meaning of the terms used in Section 9(h), such as was presented in *National Labor Relations Board* v.

[3] The compliance files of the Board disclose that, in this investigation, an agent of the Board interviewed Hite and Logue as to their functions; that Logue denied that he had ever served as recording secretary; and that this was verified by an examination of the minutes of union meetings in 1956 and other years, which disclosed that the recording secretary was either Hite or someone specially designated to act in his place for purposes of the particular meeting, but never Logue.

Highland Park Manufacturing Co., 341 U.S. 322 (whether the CIO was a "national" labor organization), and *National Labor Relations Board* v. *Coca Cola Bottling Co. of Louisville*, 350 U.S. 264 (whether "officer" can be limited to those offices listed in the union's constitution). Rather, it involved the purely factual questions of who held the position of Recording Secretary, which was admittedly an office within the meaning of Section 9(h), and whether he had filed the required affidavit. The litigation of such questions in unfair labor practice and representation cases, unlike the consideration of the purely legal questions involved in *Highland Park* and *Coca Cola*, would inject a host of collateral issues into such proceedings.[4] This would be contrary to the Congressional intent [4a] to insure expeditious resolution of the "merits" of unfair labor practice or representation cases. Accordingly, since neither Section 9(h) nor the companion Sections 9(f) and (g) established any procedure for determining whether the affidavits and other information required by those provisions have been filed, we submit that the Board was justified in deciding to determine administratively the facts of compliance, and thus to avoid interrupting

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[4] The number of such issues is compounded by the financial and reporting requirements of the companion Sections 9(f) and (g), which would likewise be opened to litigation.

[4a] See 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 1542, 1547, 1625.

particular unfair labor practice or representation cases.[5]

Respectfully submitted,

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JANUARY 1960

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[5] When Sections 9(f), (g) and (h) were enacted, the Board established elaborate administrative machinery for the purpose of enabling it to keep a continual check on labor organizations using its processes and to determine whether they have filed and kept current the documents required by that section. See *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 844, n.1 (C.A. 4). To assist it in its investigations, the Board encouraged parties to an unfair labor or representation proceeding to bring to its attention all matters affecting the union's compliance status. When it found reasonable cause to believe that a question as to sufficiency of compliance existed, it instituted a separate administrative proceeding to resolve that question. See *Sunbeam Corp.*, 94 NLRB 844; *Coca Cola Bottling Co. of Louisville*, 108 NLRB 490. This course was followed here—the Board investigated the Company's contention concerning Local 307's recording secretary and found that there was insufficient substance to it to warrant the institution of a formal compliance proceeding (n.3, *supra*).

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